Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

ROBERT W. JONES,

Petitioner,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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NOVEMBER 16, 2005

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QUESTIONS PRESENTED

1. Did the court of appeals contravene Illinois state law in ruling that petitioner Jones was not defrauded of his job because he was an at-will employee who could have been terminated at any time, contrary to the Illinois Supreme Court ruling that: "When a discharge contravenes public policy in any way the employer has committed a legal wrong. However, the employer retains the right to fire workers in cases 'where no clear mandate of public policy is involved.'" *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 130 (1981)? (citing omitted)

2. Did the court of appeals contravene this Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003), regarding the use of circumstantial evidence and the standard of proof in a mixed-motive discrimination case?

3. Did the court of appeals contravene the standards for granting summary judgment, both in granting summary judgment to respondent Lucent and in denying summary judgment to Jones?

4. Did the court of appeals abandon the role of impartial adjudicator and fail to apply the law, thereby depriving Jones of due process under the Fifth Amendment?

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W. Keeton, Prosser and Keeton on Torts §§ 105-110
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OPINIONS BELOW

The district court's memorandum opinion and order granting summary judgment to Lucent is reported at 313 F.Supp.2d 771. App., *infra*, at 6a-9a. The court of appeals order affirming the judgment is unreported. App. at 1a-5a.

JURISDICTION

The court of appeals issued its order on June 5, 2005. A timely petition for rehearing and rehearing en banc was filed. On August 30, 2005, the petitions for rehearing and rehearing en banc were denied. App. 10a-11a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, provides in relevant part:

> (a) It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * * *
>
> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> > (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification

> reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age *.

29 U.S.C. § 623

The Illinois Common Law Act provides in relevant part:

> Sec. 1. That the common law of England * * * shall be considered as of full force until repealed by legislative authority.

5 ILCS 50/1

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT OF THE CASE

The questions presented for review are a result of the court of appeals having so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This case calls into question the integrity of the judicial system.

I. Factual Background

What follows is as concise a condensation of the facts as will allow the issues to be presented to the Court. Even though this may appear extensive, there is still additional

supportive evidence, some of which is referenced during the argument. The issues, however, are primarily issues of law.

Background

Robert W. Jones was employed by Lucent Technologies, Inc., f/k/a Western Electric/AT&T, from 1979 until he was laid off in April 2001 at the age of 46. Most recently, he worked with a group providing 24x7 critical support for internationally deployed wireless switching systems.

Jones was hired into the wireless organization by Sivaram Krishnan, officially transferring to his group on April 26, 1999. Jones had previously worked with Krishnan before he became a supervisor; most recently from 12/93 - 09/95 in the 5ESS Switch International Customer Technical Support department. The 5ESS Switch was a major component within the architecture of the wireless switching system and Krishnan hired Jones based on Jones's knowledge and skills in this area. During the previous year's 1998 performance review, in a different organization working on a different product, Jones was given a poor performance rating. This was the first time that Jones received a poor performance review.

At the time of Jones's first performance rating in the wireless organization, covering the period up to 9/30/99, Jones was deemed to not have been in the organization long enough to establish performance so he was slotted in the same category as from the previous organization. This was band 4. Around April of 2000, Krishnan opted out of being a supervisor and returned to the technical universe. However, he continued to fulfill some roles of supervisor until a replacement was found. Krishnan conducted a mid-year performance review with Jones. Jones received positive feedback from Krishnan who, among other things, gave a

general assessment saying "You're in the middle" and at the end of the meeting stated "My recommendation would be that you be taken off of this list," implying the list of being in a poor performance category.

In June of 2000, Umesh Joshi was promoted to supervisor and brought in from another organization to replace Krishnan. Krishnan continued in a sort of co-supervisor capacity to help Joshi get onboard.

Within the next month, Joshi had individual "get acquainted" meetings with the group members. He asked people what their career plans were in the form of "Where do you want to be in the next 2-5 years?" Jones stated he would qualify for a service pension in about four years; he would like to be able to do this job for four years and then be able to retire. Joshi wrote "retire" on his notepad.

The 2000 Year-End Performance Review

Joshi conducted the year-end performance review in 2000. The first thing that happened at the beginning of the performance review meeting was that Jones was shown his performance rating and he was still in band 4. Jones immediately stated: "I thought Krishnan said during mid-year performance review that his recommendation would be that I be taken off of this list?" Joshi's immediate response was, "Maybe I should explain. You're in the middle. I'm on the conference calls. I know the contribution that you make. You're not on any list. This is just for my personal use."

In conjunction with other facts that aren't detailed here, when Joshi stated "This is just for my personal use," Jones inferred that Joshi was allowed to determine the performance rating on his own and that he had the freedom to attribute his

own significance to a particular rating category; that he had a personal use for departing from the traditional meanings associated with the performance bands. Based on this and the feedback that Jones had received, especially Joshi's statement that "You're in the middle," which was consistent with Krishnan's previous feedback, Jones believed that the band 4 rating was no longer considered poor performance and the rating would not be used as such in the event of a downsizing. So Jones did not continue to make an issue of the rating at that point since Joshi was a new supervisor going through performance review for the first time and he had his hands full just getting acclimated to the job.

The Termination

In December 2000, Lucent announced that there would be a Force Management Program (FMP) to reduce headcount. Joshi received training on how he should conduct the Employee Notification process. Part of the training material listed "passing or deferring blame" as a common pitfall. The material trained managers to "Tell the employee that you completed the assessment (if used) which resulted in this decision (or name the person who did)." At the time of employee notification, Joshi knew that the criteria for employees placed at-risk were those employees who were rated in bands 4 and 5.

Jones was informed that he was at-risk on the morning of 02/15/01. At the time of his notification, Jones asked Joshi what this was based on. Joshi's response was: "The decision was made by upper management. I'm just the messenger." Jones then asked if this was based on performance review. Joshi's response was: "I'm not here to discuss performance review."

After pursuing a futile attempt, with Joshi's boss, to get an explanation of his at-risk status in light of the feedback he had received during the year and the statements Joshi had made during performance review, Jones initiated an internal EEO age discrimination investigation against Joshi based on Jones having previously indicated his desire of wanting to be able to retire, the statements Joshi made during performance review and Krishnan's feedback during mid-year performance review. When the investigator reported to Jones that she didn't find evidence of age discrimination, Jones asked what Joshi said about his statement made during performance review starting with "Maybe I should explain. ... ." The investigator said: "He said he didn't recall saying that."

Jones's employment was terminated on April 15, 2001. Jones would not have been terminated but for the band 4 rating.

II. Proceedings In The District Court

Jones filed a one count complaint alleging age discrimination which was subsequently amended to include a fraud count. The district court had jurisdiction over Jones's age discrimination claim pursuant to 29 U.S.C. § 626(c) and 28 U.S.C. § 1331. The district court had supplemental jurisdiction over Jones's common law fraud claim pursuant to 28 U.S.C. § 1367(a).

Both parties filed motions for summary judgment. For the age discrimination claim, Lucent claimed Jones had no direct evidence of discrimination and moved for summary judgment on the basis of a narrow interpretation of the McDonnell Douglas burden-shifting approach. Jones moved for summary judgment using the direct method and circumstantial evidence pointing directly to an age bias. Jones's evidence of motive